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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1524 (2)

BERTELL OLLMAN,

Petitioner,

v.

ROWLAND EVANS and ROBERT NOVAK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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The respondents, Rowland Evans and Robert Novak, respectfully request that this Court deny the petition for writ of certiorari seeking review of the District of Columbia Circuit's *en banc* opinion in this case. That opinion is reported at 750 F.2d 970 and set forth in the Appendix to Petitioner's Brief for Certiorari.

Statement of the Case

The 1978 nomination of Professor Bertell Ollman to head the Department of Politics and Government at the University of Maryland provoked serious objections from the Acting Gover-

nor and Members of the University's Board of Regents. Appendix to Petitioner's Brief for Certiorari at 70, fn.8 [hereinafter "App."]. Their concern was with Ollman's Marxist outlook. The American Association of University Professors promptly objected, urging that personal political views were irrelevant, and that the proposed appointment must be considered on the basis of academic qualifications. App. 70, fn.8.

Evans and Novak listened to that debate and then suggested, in effect, that the AAUP was correct. In an effort to refocus the debate, they asserted two things: (a) that the discussion should consider academic qualifications; and (b) that it should be conducted by academics, not politicians. (The text of the column is at App. 46-48). Their column then outlines evidence relevant to those issues. It does not express a judgment on whether Ollman should be appointed.

The Evans and Novak column proceeds on the basis of Professor Ollman's own writings, much in the manner of a book review. Two writings are discussed: an article entitled, *On Teaching Marxism and Building the Movement,* NEW POLITICAL SCIENCE, 5-9 (Winter 1978) [hereinafter, "*On Teaching Marxism*"]; and Ollman's principal scholarly production, ALIENATION: MARX'S CONCEPTION OF MAN IN CAPITALIST SOCIETY (2d ed. 1976) [hereinafter "ALIENATION"].

Evans and Novak begin with Ollman's article, *On Teaching Marxism.* That article states that most of Ollman's students, at the end of the course, indicate that they agree with Marxian analysis. *On Teaching Marxism,* 5. Ollman then says,

> "If non-Marxists *see my concern with such questions as an admission* that the purpose of my course is to convert students to socialism, I can only answer that in my view . . . a correct understanding of Marxism . . . leads automatically to its acceptance."

On Teaching Marxism, 5 (emphasis added).

Evans and Novak quote part of that sentence, calling it a concession by Ollman as to the purpose of his course. App. 47. They then add the most provocative quotation in his article: " 'Our prior task, before the revolution', he writes, 'is to make more revolutionaries. The revolution will only occur when there are enough of us to make it.' " Article (App. 47), *quoting On Teaching Marxism,* 8.

Those quotations, say Evans and Novak, raise the question of whether Ollman intends to use the classroom for indoctrination. App. 46.

Evans and Novak's second point is that Ollman's qualifications should be discussed by academics. App. 46, 48. They point to a reluctance within the academic community to confront publicly the "measurement of Ollman's scholarship" by recounting one appraisal of his scholarly work, and then by quoting that source as being unwilling to make the same statement publicly, because it just isn't done. App. 48.

The evaluation of Ollman's work relates to his book on Marxism and alienation. That work, according to Evans and Novak, "does not abandon hope for the revolution forecast by Karl Marx in 1848". App. 47-48. The authors reach that conclusion based on a quotation from the book which refers to the "present youth rebellion" and the manner in which it will "[help] to change the workers of tomorrow" to make possible "a socialist revolution." App. 48, quoting ALIENATION, 250.

That thesis is then commented on by an outsider, whom Evans and Novak quote as calling the thesis "pamphleteering." Drawing a conclusion from that evaluation, the source adds that "Ollman has no status in the profession . . . ," and then states his unwillingness to repeat the appraisal in public, because "academic culture" forbids doing so. App. 48.

The Evans and Novak column then ends by reciting the questions to be raised, repeating that politicians are not the proper people to resolve them, and terming the unwillingness of

academics to do so as the real crisis raised by Professor Ollman's nomination. App. 48.

Reasons For Denying the Writ

I.

The Issues Stated In The Petition Are Inappropriate For Review

The petition suggests that five important issues are raised by this case. Two of them, stated with stunning simplicity, are the definition of an "opinion" and the method for distinguishing a "fact" from an "opinion". Petitioner's Brief for Certiorari at 4-5 [hereinafter "Petition"]. Those abstractions have been debated, without any prospect of resolution, by philosophers and historians since time immemorial. This case neither requires nor justifies any such inquiry. Indeed, even if the Court were prone to decide constitutional questions by issuing broadly stated outlines rather than in case-by-case steps, this case would not provide a useful vehicle for doing so. The case turns on two comments, both based on the petitioner's own writings, which lie within the range of comments protected as hyperbole by this Court's prior cases.

The opinions below consider the issues in greater depth and with more eloquence than will this brief. Nonetheless, it may be useful, and we therefore attempt, to outline how narrow the issues in this case are, and thus to refute petitioner's contention that the Court of Appeals has threatened the very foundations of the law of libel. Petition at 30.

A.

The common law of defamation reaches, as petitioner claims, every statement tending to "diminish the esteem, goodwill or confidence in which [one] is held . . ." Petition at 5,

citing PROSSER, THE LAW OF TORTS, 739 (4th ed. 1971) [hereinafter "PROSSER"]. Subject to some variation among the states, that very broad definition makes for liability in an enormous number of situations. As was the case with the common law of crime, the breadth of liability eventually resulted in the creation of a large number of defenses, most of them in the form of privileges relating to defend occasions.

The defenses developed by the common law included one for fair comment on matters of public concern. This defense allows the review of books, the appraisal of athletes and entertainers, the evaluation of restaurant fare and judgments about political condidates, on the ground that each had invited appraisal. The majority view protected the evaluative conclusions; a minority view went a step further, protecting misstatements of fact made in the course of the appraisal, so long as the misstatement was honestly made. PROSSER, 819-20; R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS, 168 (1980).

It was the minority view protecting honest misstatements of fact to which this Court turned in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280-282 (1964) as source material for a new constitutional privilege, quoting from *Coleman* v. *MacLennan*, 78 Kan. 711, 98 P. 281 (1908), a case involving comment on a candidate for public office. Having federalized a version of the minority common law position, it surely is not surprising that *New York Times* should also, to some extent, comprehend the narrower common law majority position that comments based on those facts are also protected. Dean Prosser assumed that was the case as early as 1971. PROSSER § 118 at 820. It is just such comments which are in issue here.

In parallel with this development, this Court has been quite careful not to constitutionalize the question of what words are defamatory. In case after case, it has accepted whatever the state or lower federal court said was state law with respect to

whether the words are libelous. *E.g., New York Times Co.* v. *Sullivan,* 376 U.S. 254, 267 (1964); *Gertz* v. *Robert Welch Inc.,* 418 U.S. 323, 347 (1974); *Hutchinson* v. *Proxmire,* 443 U.S. 111, 122-23 (1979); *Bill Johnson's Restaurants, Inc.* v. *NLRB,* 461 U.S. 731, 745 (1983). The parallel developments are complimentary to each other. It is the adoption of at least part of the fair comment doctrine as constitutional law which enables the Court to avoid usurping state law as to whether the words are defamatory. Were one to adopt petitioner's formulation, eliminating the constitutional defense and leaving to a jury the sole remaining question of whether the words are defamatory and false, see Petition at 26-27, the Court's ability to avoid federalizing the question of which words are defamatory would be starkly narrowed. The goal of preserving state law is thus better served by extending constitutional protection to fair comment. Doing so does not impinge on what is defamatory; it only adds a defense to otherwise defamatory words.

B.

That process of preserving state libel law, while protecting established constitutional interests, describes, we suggest, exactly what this Court has done. The process is illustrated by *Greenbelt Publishing Association* v. *Bresler,* 398 U.S. 6 (1970). *Greenbelt* involved a tract developer who offered a free school site in return for a zoning change. That proposed exchange was termed "blackmail" by several citizens and the charge was repeated by the newspaper. The case went to a Maryland jury on the theory that "blackmail" was the charge of a crime. Because the publisher knew that no crime had been committed, *New York Times* offered no protection. The court's reversal was on the ground

> ... that as a matter of constitutional law, the word "blackmail" in these circumstances was not slander when spoken and not libel when reported in the Greenbelt News Review.

398 U.S. at 13.

Greenbelt so held because everyone must have understood "what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized." *Id.* at 14. The only suggestion of the legal theory underlying the result is in the sentence:

> "On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable."

Id.

Greenbelt can be read several ways. It can be read as overriding the state law that ambiguous words go to the jury, so that the jury can decide if they were used in a defamatory sense. So read, it would be the first case constitutionalizing the question of whether the words are defamatory. And it would do so in a very broad way, since it would be a holding that ambiguous words are to be read innocently if an innocent meaning is reasonably available.[1]

More narrowly, *Greenbelt* might be read as establishing the qualified privilege to report whatever is said at a governmental meeting, though it did not state what the qualifications on the privilege might be, or as creating an unqualified right of neutral reportage, *Edwards* v. *National Audubon Society,* 556 F.2d 113 (2d Cir.), *cert. denied sub. nom. Edwards* v. *New York Times Co.,* 434 U.S. 1002 (1977). The Court's statement that "blackmail" was not slander when spoken indicates, however, that the original statement was also protected, and neither of these privileges protects the underlying statement.

The sensible reading, and the one commonly given, depends on the Court's statement that "blackmail" was exaggeration or epithet—words conveying as much the strength of the

[1] Such a rule exists in Illinois, *Chapski* v. *Copley Press,* 92 Ill.2d 344, 442 N.E. 2d 195 (1982), but hardly anywhere else.

speaker's feeling as facts about the subject. The opinion uses the words "epithet" and "hyperbole", and while it does not say more explicitly what legal category is being invoked, the narrowest reading is that the common law protecting hyperbole is being invoked as a matter of federal law.

That reading of *Greenbelt* does the least violence to the role of the states in the law of defamation. It leaves the definition of what is defamatory to the states, and invokes a privilege—a defense—to some words defamatory on their face. So considered, it is an adjunct to *New York Times*, controlling those cases, like *Greenbelt*, in which knowing or reckless disregard for the truth is not available as a defense, because one possible meaning of the words is a meaning known to be false. None of the opinions below disagree with this reading of *Greenbelt*.

The link to fair comment—to a category more general than that of hyperbole—was made in *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO* v. *Austin*, 418 U.S. 264 (1974), a case which involved a pamphlet which accused plaintiff of being a "scab" defined in the words of Jack London as a traitor to one's country. *Letter Carriers* proceeds from the requirement of proving falsity:

> Before the test of reckless disregard can be met, there must be a false statement of fact. *Gertz* v. *Robert Welch, Inc.*, *post*, at 339-340. But, in our view, the only factual statement in the disputed publication is the claim that appellees were scabs, that is, that they had refused to join the union.

418 U.S. at 284. As for the definition of "scab", the court stated:

> The definition's use of words like "traitor" cannot be construed as representations of fact. . . . Expression of such an opinion, even in the most pejorative terms, is protected under federal labor law.

418 U.S. at 284. A page later, however, the Court put the issue more narrowly, referring to the definition of a scab as "rhetorical hyperbole." 418 U.S. at 285-86.

Greenbelt and *Letter Carriers* indicate that the Court has supplemented *New York Times*. The two cases require one to focus on more than the words used, and consider whether, in context, they were used in a way which asserted a fact. The two cases do not adopt the whole common law of fair comment as First Amendment doctrine, but that is not surprising; the Court does not make constitutional law by adopting whole chunks of the common law. First Amendment reasoning is balancing; only those parts of fair comment which balance values as does the First Amendment are likely to be adopted. The opinions below focus on precisely the factors *Greenbelt* and *Letter Carriers* suggest are appropriate. They require that the context be considered and they explore whether the assertions are facts appropriate for proof in a courtroom. While there is diversity of result below, there is no disagreement, save in Chief Judge Robinson's opinion, as to what *Greenbelt* teaches or how it is to be applied.[2]

C.

The issues the Petition seeks to have this Court decide include the definition of "opinion", the relationship between opinion and hyperbole, and the tests one uses to distinguish between fact and opinion. Petition at 4-5. Each of those issues calls for an essay on an abstraction; each would require the Court to go far beyond the facts of this case and, in effect, to at

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[2] Chief Judge Robinson's dissent argues for quite a different basic approach, creating a category called "hybrid opinions" and requiring that *all* relevant facts be stated before expressing such opinions. App. 111-12. Having added that superstructure to *Greenbelt*, Judge Robinson finds the column in this case did not meet the additional requirement of stating all the facts. App. 130-31.

least outline how much of fair comment will eventually be constitutional law. It is surely more appropriate to decide those matters case-by-case, building on the start made by *Greenbelt*. Granting review to consider conceptual abstractions seems appropriate only if the Court wishes, at one extreme, to overrule *Greenbelt*, or, at the other extreme, to forecast the outer limits of what *Greenbelt* began. Neither course seems sensible; *Greenbelt* is an 8-1 decision on these issues, and is surely correctly decided; describing the full scope of fair comment has confounded even Dean Prosser's powers of description. PROSSER, 819 *et seq.*[3]

[3] The petition also suggests the need for "a fuller record to determine whether they are merely opinions," Petition at 28, and that the case requires a definition of "the role of summary judgment where the defense of opinion has been raised." Petition at 5. Petitioner stresses that the answer filed in the District Court denied knowledge or information as to plaintiff's academic reputation, arguing that the answer was an admission and raises a factual issue as to whether the statement of opinion was one honestly held. Petition at 29.

We believe petitioner misconceives the issue. The answer said what it said because Evans and Novak had gotten, and repeated, one person's opinion of Ollman's work. They had not purported to survey the profession and therefore could not claim to know more. Their denial of general knowledge is not an admission; it is fully consistent with what the column did, which was to present one person's appraisal of Ollman. The motion was termed one for summary judgment only because it submitted the full text of the short work on how he teaches and the chapter from his book which discussed the likelihood of a delayed socialist revolution. Those materials were submitted so that the court could see that the subjects were discussed, the quotes were accurate, and the paraphrases were rational summaries of a fairly complex text. Those are factual matters, but they are not the center of this dispute. The questions raised here were essentially decided as if on a motion to dismiss.

II.

The Issues Actually Decided Below Were Correctly Decided

The only reason for granting review is that the theory of the decision below somehow exceeds what is already apparent from *Greenbelt* and *Letter Carriers*, and is clearly inconsistent with those cases. None of the opinions below suggest that to be the case. Instead, the dispute below centered on the application of those cases to the statement of "no status".

In this Court, Petitioner has argued a second portion of the column, on which there was no disagreement below, except on the theory of full disclosure of relevant facts stated by Judge Robinson. That is the allegation that Professor Ollman indoctrinates his students. Petition at 3. We turn first to this added contention. The actual passage in the column reads:

> Ollman's intentions become explicit in "On Teaching Marxism and Building the Movement," his article in the Winter 1978 issue of New Political Science. Most students, he claims, conclude his course with a "Marxist outlook." Ollman concedes that will be seen "as an admission that the purpose of my course is to convert students to socialism."
>
> That bothers him not at all because "a correct understanding of Marxism (as indeed of any body of scientific truths) leads automatically to its acceptance." Non-Marxist students are defined as those "who do not yet understand Marxism." The "classroom" is a place where the students' "bourgeois ideology is being dismantled." "Our prior task" before the revolution, he writes, "is to make more revolutionaries. The revolution will only occur when there are enough of us to make it."

App. 47.

None of these quotations is inaccurate. Petitioner apparently wants to put the text of Professor Ollman's article and the Evans and Novak column before a jury and, after some

testimony, ask them whether the column fairly reflects the text. The prospect is daunting. No reviewer has ever thought he would wind up in the dock facing that kind of second guess of his work. It would surely be possible for each side to produce three witnesses to testify that Professor Ollman did, or did not, imply that "making revolutionaries" has something to do with what goes on in his classroom. When all six are finished, we would know only that the article can be read more than one way. We may even be told that "making revolutionaries" was rhetorical hyperbole, and should have been disregarded. Like who lost Vietnam or China, the issue is surely one that does not belong in a courtroom. The analogy of the book review—the right to interpret a text so as to comment on it—is appropriate here. Without any prior case law, one would not doubt that the First Amendment protects the most ascerbic of reviews. In this case, the question is even easier, because it involves only whether the text rationally supports the paraphrase of the text, the first step in appraising any non-fiction work.

The article Professor Ollman wrote did refer to "an admission" concerning the "purpose of [his] course" and to "Our prior task" to "make more revolutionaries." *On Teaching Marxism,* 5, 8. A fair reading is that Ollman himself raised the problem, and Evans and Novak only stated what Ollman himself had said. One cannot commit libel by quoting the plaintiff. The context here is petitioner's own writings. The words are about those writings, rather than, as petitioner asserts, being about what he actually does. Evans and Novak did not profess to have any direct evidence of what Ollman did in his classroom, and only such a claim could raise a legitimate issue.

Petitioner's second objection is to that portion of the column which follows the discussion of Professor Ollman's thesis that the revolution predicted by Marx in 1848, while long delayed, may finally be near at hand. Evidence of that comes from the "present youth rebellion," says Ollman. ALIENATION, 250. The column presents a trenchant appraisal:

> Such pamphleteering is hooted at by one political scientist in a major eastern university, whose scholarship and reputation as a liberal are well known. "Ollman has no status within the profession, but is a pure and simple activist," he said. Would he say that publicly? "No chance of it. Our academic culture does not permit the raising of such questions."

App. 48.

The key to the paragraph is its first two words—"such pamphleteering". That value judgment, which every appellate judge below agreed is protected as hyperbole, is followed by the statement, "Ollman has no status within the profession . . . ," which provoked wide disagreement below. But the statement as to status is no different from the statement of pamphleteering. They are two separate ways of criticizing Ollman's thesis of the impending arrival of the revolution. Each is the individual judgment of the speaker. That point, not made by any of the opinions below, is the simplest reason the "no status" statement ought to be protected. The statement that a book is pamphleteering was readily understood below as an evaluation by the speaker. It does not purport, and was not understood by the Court of Appeals, to be an evaluation shared by other political scientists. Precisely the same meaning attaches to the statement of "no status". It is an evaluation by one person; it does not purport to be a statement about what the majority of political scientists would say. It reflects the speaker's judgment that academics who pamphleteer have no status, because academic status requires work of greater depth. Pamphleteering and status are thus parallel, and both are rhetorical hyperbole, overstatements intended to emphasize the point. Both lie well within *Greenbelt* and *Letter Carriers,* because the context negates their being anything other than an evaluation and thus not the kind of statement which one could find true or false.

There is a second way of interpreting the "no status" comment. That is to read it as stating the speaker's impression of what *others* would say about Professor Ollman. The discussion in the Court of Appeals assumed that the statement of "no status" was a statement about how others regard Professor Ollman. On that assumption, the Court explored the ability to establish the truth or falsity of that kind of statement in a courtroom.

The difference between what the column said and a statement as to what others think of Ollman is illustrated by an unrelated evaluation of Professor Ollman. During the course of Ollman's Civil Rights Act suit against the University of Maryland, Professor John Wahlke, the former president of the American Political Science Association, testified that he had advised the President of the University of Maryland that the recommendation to hire Ollman was a "mystifying choice" because he "was not a nationally known scholar of real stature" and that he did not believe Ollman would even be considered for a full professorship in his department at Iowa. *Ollman* v. *Toll*, 518 F.Supp. 1196, 1207-08 (D.Md. 1981) *aff'd per curiam* 704 F.2d 139 (4th Cir. 1983). Those two statements, that Ollman would not be considered for a full professorship and that he was not a nationally known scholar of real stature, look far more like statements of fact than does what was said in the column. They are more measured, and thus harder to describe as hyperbole; and the statement as to tenure more clearly reflects a judgment about how others perceived Ollman. As a result, they more clearly justify the kind of debate which occurred in the Court of Appeals about the ability to establish in a courtroom the truth or falsity of what was said. We should doubt, however, that even Professor Walke's evaluation is fairly susceptible to proof in a courtroom. How, after all, does one prove what the University of Iowa would do if asked to grant a full professorship to someone it has never considered? And how does one establish whether Ollman is a nationally known scholar of stature?

Petitioner urged in the Court of Appeals that such issues are frequently tried to juries, and Judge Wald's dissent below adopts that view. App. 132. Presumably the jury would hear testimony on each side like that of Professor Wahlke. How odd it is, however, to urge that what was said below is not opinion, and, at the same time, urge that expert testimony is the proper way to show the falsity of what was said. Expert testimony is admissible only when the subject matter is one of opinion. The nature of the proposed testimony is thus wholly inconsistent with the argument that a statement about stature is not a matter of opinion.

These considerations suggest that even Professor Wahlke's evaluation of Professor Ollman would be protected as fair comment. What Evans and Novak said was, however, far less measured, and thus more clearly hyperbole. Nonetheless, even if one considers the statement of "no status" as a statement about what others think of Professor Ollman, it ought to be protected on the ground that it is not an assertion of verifiable fact. Doing so is consistent with the holding in *Letter Carriers* that only facts can be false.

Considered either as a statement by one person of his own judgment or as a statement about what others think, the statement of "no status" is not different from the kinds of hyperbole considered in *Greenbelt* and *Letter Carriers*. The statement is one protected by the notion of fair comment, whatever the ultimate dimensions of that defense may be, and granting review here will not advance the process of staking out those dimensions.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari ought to be denied.

Respectfully submitted,

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